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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 274

COMMERCIAL PICTURES CORPORATION,
Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, petitioner-appellant submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment and order of the Court of Appeals of the State of New York entered in this cause on May 28th, 1953.

Dates of Judgment Sought to Be Reviewed and of This Appeal

The judgment and order of the Court of Appeals of the State of New York, sought to be reviewed herein, affirmed the order of the Appellate Division of the Supreme Court

of the State of New York for the Third Judicial Department. The judgment and order of the Court of Appeals, and the majority and dissenting opinions of the Judges of that Court, were filed on May 28th, 1953. The remittitur of the Court of Appeals was issued to the Supreme Court of the State of New York, Albany County, and an order was entered in the latter court on June 12th, 1953, making the order of the Court of Appeals the order of said Supreme Court.

A petition for appeal to the Supreme Court of the United States is presented to the Chief Judge of the Court of Appeals of the State of New York herewith, to wit, on August 4th, 1953.

The Court of Appeals of the State of New York is the court of last resort in that state. Its judgment in this case is final, both in form and substance, and disposes of all of the issues herein.

Opinions Below

The opinions rendered by the Court of Appeals of the State of New York are reported in 305 N. Y. 336. Copies of those opinions are annexed here to as Exhibit A. The opinions rendered by the Appellate Division of the Supreme Court of the State of New York for the Third Judicial Department, are reported in 280 App. Div. 260. Copies of those opinions are annexed hereto as Exhibit B.

Jurisdiction

This cause was instituted to review the refusal of the appellees, the Regents of the University of the State of New York, to issue appellant a license for the exhibition of a certain motion picture, "La Ronde", in New York, and to compel the Regents to issue such license. Appellees acted under the authorithy conferred by various sections of the New York State Education Law. Appellant challenged the

validity of those statutes on the ground that they were repugnant to the Constitution of the United States. The decision of the Court of Appeals of the State of New York, the state court of last resort, was in favor of the validity of the challenged statutes.

The jurisdiction of the Supreme Court of the United States to review the judgment and order of the Court of Appeals of the State of New York by direct appeal, is conferred by Title 28, United States Code, Sections 1257(2), 2101(c) and 2104. The following decisions sustain the jurisdiction of the Supreme Court to review the said judgment and order on direct appeal in this case: *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Gelling* v. *Texas*, 343 U. S. 960; *Winters* v. *New York*, 333 U. S. 507.

The Statutes Involved

The validity of the following statutes is involved: New York State Education Law, Sections 120, 122, 124, 129, 131. These statutes prohibit the exhibition of a motion picture film at any place of amusement in the State of New York unless the film is licensed by the Motion Picture Division of the Department of Education or its Director. Section 122 provides for the denial of a license if the Motion Picture Division or its Director find a film to be "obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime." The exhibition of an unlicensed film is punishable by criminal prosecution (Sections 129, 131).

The sections of the New York State Education Law, here involved, read as follows:

"§ 120. Motion picture division continued; organization.

There shall continue to be in the education department a motion picture division. The head of such division shall be a director, who shall be appointed by

the regents, upon the recommendation of the commissioner of education. The regents may consolidate such division with the division of visual instruction or may assign to the motion picture division the functions, powers and duties of other divisions, bureaus or officers in the department. The board of regents, upon the recommendation of the commissioner of education, shall appoint such officers and employees as may be needed and prescribe the powers and duties and, within the limits of the appropriations made therefor, fix the compensation of such director, officers and employees. All expenses actually and necessarily incurred in the performance of their duties shall be allowed to such director, officers and employees."

"§ 122. Licenses.

The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto."

"§ 124. Review by regents.

An applicant for a license or permit, in case his application be denied by the director of the division or by the officer authorized to issue the same, shall have the right of review by the regents. The regents, however, by rule may provide that such reviews may be heard and determined by a committee of the regents, the commissioner of education, the deputy commissioner of education or an assistant commissioner of education. A determination upon such review refusing

a license shall be reviewable by a proceeding under article seventy-eight of the civil practice act at the instance of the applicant."

"§ 129. Unlawful use or exhibition.

It shall be unlawful to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel, other than those specified in subdivision one of section one hundred twenty-three, unless there is at the time in full force and effect a valid license or permit therefore of the education department and unless such film or reel shall contain for exhibition upon the screen identification matter in the substance, style and length which such department shall prescribe.

This section shall not be construed to prohibit the making of an executory contract for the sale or leasing of a film or films, provided the film shall have been licensed under the provisions of part two of this article and the license seal attached at the time of delivery."

§ 131. Penalty.

A violation of any provision of part two of this article shall be a misdemeanor."

Statement as to the Nature of the Case

Petitioner-appellant Commercial Pictures Corporation is the sole owner of the distribution rights in the United States of a French-language motion picture film, with English subtitles, produced in France in 1950 and bearing the title "La Ronde". The film is part of the Record on Appeal.

Pursuant to Sections 120 and 122 of the New York State Education Law, quoted above, petitioner applied to the Director of the Motion Picture Division of the New York State Education Department for a license to exhibit the motion picture "La Ronde" in the State of New York. That application was denied, and a license refused on April

4th, 1951, on the ground that the picture was "immoral" and "would tend to corrupt morals", within the meaning of Section 122 of the said Education Law. The picture was then edited and resubmitted, and on April 13th, 1951 a license was again refused.

In accordance with Section 124 of the said Education Law, petitioner thereupon appealed to the Board of Regents of the State of New York. That body, acting through a committee of three members, by order dated May 25th, 1951, dismissed the appeal, holding that in their opinion, "the presentation of such a film in motion picture theatres in this State is 'immoral' and 'would tend to corrupt morals' within the meaning of Section 122 of the Education Law" (fols. 34-8).

Petitioner then commenced a proceeding in the Supreme Court of the State of New York, Albany County, pursuant to Article 78 of the New York Civil Practice Act, seeking a review and annulment of the said determination of the Board of Regents and a direction for the issuance of a license. The proceedings were transferred to the Appellate Division of the Supreme Court, Third Judicial Department, and that court on June 27th, 1952, by a three-to-two decision, confirmed the determination of the Board of Regents.

Petitioner thereafter appealed to the Court of Appeals of the State of New York, the court of last resort in that state, and that court on May 28th, 1953 rendered a four-to-two decision affirming the order of the Appellate Division.

As is succinctly pointed out in the dissenting opinion of Judge Dye in the New York Court of Appeals:

> "According to the record, the picture 'La Ronde' since its admission through Customs without objection (U. S. Code, tit. 18, § 1462; U. S. Code, tit. 19, § 1305) has been exhibited throughout the United States in cities and towns in the States of Arizona, California,

Colorado, Connecticut, Delaware, Florida, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Missouri, New Jersey, Oklahoma, Oregon, Texas and Washington, D. C. Nowhere has the showing of 'La Ronde' been banned except in New York. * * * We deem it significant that in the States of Louisiana (La. Rev. Statutes, tit. 4, §§ 301-307) and Massachusetts (Mass. Annotated Laws, ch. 153, §§2-4) having censorship laws, though to be sure, not as comprehensive as that in New York, the picture has had an unhampered showing as well as in places where municipal codes are in effect such as Detroit, Michigan; Salem, Oregon and Houston, Texas, to mention a few, a circumstance indicating that in a large segment of society the picture is not offensive per se. * * *"

The record further shows that the picture "La Ronde" has also been widely shown in many of the world capitals (fols. 50, 155, 167, 169); and that it ran for nearly two years in Paris and over a year in London (fol. 155). It was selected as the best film of 1951 in London and Cuba (fols. 184-7), and, in addition, received the highest awards at the Venice, Cannes and Brussels film festivals (fol. 169). It was also an Academy Award nominee in Hollywood in the spring of 1952 for story and art direction (fol. 200).

A summary description of the film is to be found in one of the reviews included in the record; *i. e.*, the review of the Daily News, Los Angeles, Sept. 21, 1951 (Record, p. 19):

"It is a French film about Vienna at the turn of the century, the Vienna of candlelight and carriages, of wine, women and waltzes. And 'La Ronde' is a waltz, about love, the round of love.

It is told in a series of intertwined episodes in which a street girl . . . loves a soldier . . . and the soldier in turn loves a lush little servant girl . . ., who loves her master's son . . ., who loves a married woman . . . whose rather stolid husband loves a naive model . . ., while the model loves a poet

. . ., who loves a worldly actress . . ., who loves a count . . . ., who, in turn, loves the street girl with whom this ring-around-the-romance began.

"All this is told with a combination of irony, candor and gentleness that makes of the whole a total gem of a motion picture. The film is based on Arthur Schnitzler's play 'Reigen', as adapted to the screen by Max Ophuls and Jacques Natanson, and it has been directed with exquisite taste by Ophuls, who in the '30s directed a very fine film, 'Liegelei', from another Schnitzler work.

The distinguished cast is flawless . . . Gracefully holding together this episodic chain of events is Anton Walbrook as the sophisticated narrator . . . Oscar Strauss' haunting waltz, 'La Ronde de L'Amour', is the recurring musical motif of the movie.

This is a picture about illicit love, but it is told without prudishness and with a deftness, discretion and understanding that make it more moral than most censor-shackled pictures on the subject.

'La Ronde' has wit. It also has melancholy. And above all it has honesty and artistry. • • •"

The record indeed shows that the film has been well received throughout its wide run and has been accorded the favorable acclaim of outstanding dramatic critics (fols. 40 *et seq.*, 154 *et seq.*).

The Constitutional Questions Involved, the Manner in Which They Were Raised, and the Decision in Favor of the Validity of the Statutes.

The constitutional questions involved on this appeal are:

1. Whether the statutory provisions under which petitioner's film was banned, are violative of the First and Fourteenth Amendments to the United States Constitution, as imposing a nonpermissible prior restraint on the exhibition of motion pictures;

2. Whether the statutory standards here applied by the state censors—namely, whether the film is "immoral" or "would tend to corrupt morals"—are so vague and indefinite as to offend both the safeguards of the First Amendment and the due process requirements of the Fourteenth Amendment;

3. Whether the film here in question is of a character that the First Amendment permits a State to exclude from public view.

The Court's attention is also directed to the other points set forth in the Assignment of Errors.

The foregoing questions were raised in the petition by which the proceedings were initiated (fols. 29-30). The questions were also raised on the arguments made before, and in the briefs submitted to, the Appellate Division of the Supreme Court of the State of New York, and the Court of Appeals of the State of New York. Both courts passed upon the questions raised, and both upheld the validity of the statutes involved.

Judge Froessel, who wrote one of the opinions in the Court of Appeals of the State of New York in favor of the decision of the majority of that Court sustaining the statutes, phrased the issues as follows in his opinion:

> "(1) Are motion pictures, as part of the press, exempt from any form of prior restraint or censorship?
>
> (2) Do the words 'immoral' and 'tend to corrupt morals', in section 122 of the Education Law, viewed in the perspective of their legislative setting, fail to provide a standard adequate to satisfy the requirements of due process?
>
> (3) Has the statute been properly applied herein."

As regards the first issue, Judge Froessel took the position that "motion pictures may present a 'clear and present danger' of substantive evil to the community", and that "the Legislature may act to guard against such evil though

in so doing it overrides to a degree the right to free expression." He held that the decision in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 was not controlling on this issue. As respects the second issue, Judge Froessel interpreted the words "immoral" and "tend to corrupt morals" as relating to "standards of sexual morality", and as so interpreted he found them not to be fatally vague or indefinite. As regards the third issue, Judge Froessel stated that the application of the statutory standards was committed to the State Board of Regents, and that it was not for the courts to form an independent judgment as to each picture, as urged by petitioner.

Judge Desmond, in a separate concurring opinion in support of the majority decision of the Court of Appeals of the State of New York, held that notwithstanding the *Burstyn* decision the State could employ censorship to meet "the danger, especially to the immature, of the free showing of demoralizing films." On the second of the above issues, he differed with Judge Froessel as regards the interpretation of the statutory standards. He held that those standards were not limited to "sexual morality", but embraced the entire broad concept of "material '*contra bonos mores*' ". His view was that even as so interpreted the standards were sufficiently definite and certain for the purposes of due process. On the third issue, he agreed with Judge Froessel that the test was whether there was a reasonable basis for the Regents' finding that the picture was "immoral" and "would tend to corrupt morals", and that there was a reasonable basis therefor.

Judges Dye and Fuld, dissenting, emphasized that like other media of communication, motion pictures are now constitutionally protected against prior censorship, except perhaps where there is a narrowly drawn statute designed to meet a "clear and present danger" or some overriding public need; that in the present case there is neither such

danger or need nor a narrowly drawn statute; and that in any event the statutory standards here are fatally vague and indefinite. They further took the position that "since reasonable men may differ on the import and effect of 'La Ronde', it follows that there is not a 'clear and present danger' sufficiently imminent to override the protection of the United States Constitution."

The Questions Involved Are Substantial

I. The sections of the New York Education Law, under which petitioner's film was banned, are violative of the First and Fourteenth Amendments to the United States Constitution, since they impose a nonpermissible prior restraint on the exhibition of motion pictures.

It is settled, since the decision in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, that motion pictures are entitled to the freedom and protection that are guaranteed to other media for the communication of ideas by the First and Fourteenth Amendments to the United States Constitution. The Supreme Court held in the *Burstyn* case that motion pictures were entitled to that protection even if it were to be assumed that they might possess a greater capacity for evil, particularly among youth, than other modes of expression (see 343 U. S. at 502).

As was pointed out in the *Burstyn* case with respect to section 122 of the New York Education Law (343 U. S. at 503):

> "The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This Court recognized many years ago that such a previous restraint is a

> form of infringement upon freedom of expression to be especially condemned. *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931)."

It has been observed that the freedom of expression guaranteed by the First Amendment is not necessarily an absolute right. It is clear, however, that freedom of expression is the rule; that the imposition of any previous restraint thereon, if permissible at all, is "recognized only in exceptional cases"; and that "the State has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case" (see *Burstyn*, 343 U. S. at 503-4).

In short, any suppression in advance of motion pictures can in no event be constitutionally supported except perhaps under a narrowly drawn statute designed to meet a "clear and present danger" of substantive evil to the community (cf. *Schenck* v. *United States*, 249 U. S. 47; *Thornhill* v. *Alabama*, 310 U. S. 88, 105). In the present case, however, there is neither any clear and present danger, nor the requisite narrowly drawn statute. There is thus no showing that the exhibition of the film here in question would be likely to produce a riot, a breach of the peace, or other public injury. The record shows that nowhere in its wide exhibition has the film met with any but favorable comment, nor is there the slightest basis for charging that it has caused any apparent lowering of standards of morality. One of the majority judges in the New York Court of Appeals (Desmond, J.) indeed conceded that the film "has a distinguished cast and a brilliant production". It is inconceivable that this picture is potentially dangerous in any sense of that word so as to warrant its being an exception to the guarantees of freedom of speech and of ideas. Mere fear of possible injury is not enough to justify repression (*Terminiello* v. *Chicago*, 337 U. S. 1).

That there is no basis whatever for justifying the repression of this film under the clear and present danger test, is

amply demonstrated in the dissenting opinion of Judge Dye in the New York Court of Appeals.

Moreover, as will be shown below, the statute here involved possesses neither the requisite narrowness nor definiteness to satisfy the safeguards of the First Amendment or the due process requirements of the Fourteenth Amendment. By permitting the prior censorship of any film which the licensing authorities deem to be "immoral" or one that "would tend to corrupt morals", the statute sets the censors "adrift upon a boundless sea", without any objective guide or standard, to make their own subjective appraisal and application from among competing notions of morality. As in *Burstyn*, so here, it is submitted that "New York cannot vest such unlimited restraining control over motion pictures in a censor" (cf. 343 U. S. at 505).

2. *In any event, the statutory standards of "immoral" and "tend to corrupt morals", as predicates for censorship, are so vague and indefinite as to offend both the safeguards of the First Amendment and the due process requirements of the Fourteenth Amendment.*

In *Burstyn*, it was held that the standard "sacrilegious" in the same censorship statute here involved, was fatally vague and indefinite, and the statute was held invalid insofar as it authorized censorship on that basis. Similarly, in *Gelling* v. *Texas*, 343 U. S. 960, a local Texas film censorship ordinance was held to offend against the First and Fourteenth Amendments on the score of indefiniteness where the criterion was whether the film was deemed by the censors to be "of such character as to be prejudicial to the best interests of the people of said City".

In *Burstyn* (343 U. S. at 505-6), the Court left open the question "whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films". The instant case, however,

involves, not the standard of obscenity, but the terms "immoral" and "tend to corrupt morals". It is clear that the terms "immoral" and "tend to corrupt morals" are words of far vaguer and undefined import than the word "obscene". As Judge Dye observed in his dissenting opinion below:

> "The term 'immoral' when not connected with 'obscene'—and here it is not—for indeed the motion picture 'La Ronde' was not banned upon the ground of obscenity—has a variety of meanings varying according to time, geography and to some extent, subjective judgment (Cardozo, Paradoxes of Legal Thought; *Fox* v. *Graves*, 253 App. Div. 475; *Parmelee* v. *United States*, 113 F. 2d 729; *United States v. Kennerly*, 209 F. 119). The lexicographers have defined 'immoral' as the opposite of moral (Oxford Dictionary) which term may and does include illicit sexual behavior (Funk & Wagnalls) but the meaning is not limited to sex impurity but includes in addition offenses 'hostile to public welfare' (Black's Law Dictionary), 'inimical to rights and interests of others', 'corrupt', 'depraved' and sometimes 'unprofessional' conduct or (C. J. S., Vol. 42), to state it broadly, anything *contra bonos mores.*"

Judge Fuld, in his separate dissenting opinion below, similarly declared:

> "* * * By attempting to cover so much, the catch-all provision barring motion pictures which the censors believe 'immoral' effectively covers nothing. The ephemeral and ambiguous character of the term is highlighted by the variant views of the very judges who now write to uphold the statute. Words as subjective as those under consideration find meaning only in the mind of the viewer and observer, render impossible administration of the statue and offend against due process. * * *"

Indeed, as noted by Judge Fuld, the four judges of the New York Court of Appeals who voted to sustain the statute,

differed sharply as to the meaning and scope of the terms in question. Thus, two of the judges (Froessel, J. and Lewis, Ch. J.), though recognizing that such terms "considered in the abstract, may be deemed broad, even as limited by common usage", attempted to avoid constitutional infirmity by interpreting the words as referring only to "sexual immorality". However, even as so limited, the words in question are of a wholly vague and ephemeral character. Those terms are obviously not intended to be synonymous with the word "obscene" in the statute, for they would then be superfluous; moreover, neither the Board of Regents nor any of the state courts found this film to be "obscene". The words thus mean something other than "obscene", and even if applicable only to "sexual immorality", the statute fails to provide any definite, objective standards for the guidance of the censors.

The other two judges, on the other hand (Desmond and Conway, JJ.), refused to limit the scope of the statutory standard to sexual immorality. Judge Desmond, in a concurring opinion in which Judge Conway concurred, stated:

> "This picture 'La Ronde' could be classed as 'immoral' in the narrower sense, too, but the statutory meaning here is the usual or dictionary one (including the law dictionaries), and its reference is to the generally accepted civilized code of morals—its prohibition is of material 'contra bonos mores' * * * If it meant, in our statute, sexually vicious only, the word 'immoral' would be tautological and repetitious, since it is there coupled with 'obscene' and 'indecent'. And why should our Legislature have placed a ban on one kind, only, of immorality? * * *"

Thus, the two separately concurring judges agreed with the two dissenting judges (thereby constituting a majority of the Court on that issue), that the statutory terms "immoral" and "tend to corrupt morals", do not have any

more definite meaning than "*contra bonos mores*". As Judge Dye observed, what is "immoral" in this sense is a concept "varying according to time, geography and to some extent, subjective judgment". The statute provides no standards or criteria to guide the Board of Regents in determining what is "immoral", beyond their own judgment, and there are likewise no judicial opinions, as in the case of "obscenity", providing any workable definition. Nor have the Regents themselves undertaken to provide any objective standards or criteria for the guidance of the individual censors (i.e., the Director of the Motion Picture Division and the three-member committee of the Regents).

The terms "immoral" and "tend to corrupt morals" are indeed so broad and so general that they could be applied to any cinematic presentation touching on any one of the many varied phases of human activity—whether it be in the fields of ethics, or social, economic, political or even religious problems—which does not happen to square with what the censors deem in keeping with the *mores* of the community. Today, a film dealing with illicit love is held to be "immoral". Tomorrow, a picture dealing with some social, economic or political problem may well be held to be "immoral". The point at which the censorship will be imposed is nowhere marked out, and it is this very indefiniteness that spells the invalidity of the statute, both as a serious threat to freedom of expression and as a denial of due process.

In essence, the standard of "immoral" is no more definite and certain than the standard held invalid in *Gelling v. Texas, supra*—namely, whether the film is "prejudicial to the best interests of the people of said City". In each instance the standard is so vague and general as to permit haphazard and inconsistent application. See also *Musser v. Utah*, 333 U. S. 95. As Judge Dye observed, the action of the Regents in the instant case is inconsistent with their action in other cases in issuing "permits to show other

pictures dealing not only with illicit love but also crime such as Dreiser's 'American Tragedy' * * *, 'A Street Car Named Desire' and 'The Outlaw', and those of a lurid type whose blow up posters call attention to 'Outcast Girls', 'Female Sex', 'Naked Realism'."

It is submitted that the Constitution clearly forbids the vesting in administrative officials of such uncontrolled power to limit and restrict the free expression of ideas.

3. *The film here in question is not of a character that the First Amendment permits a State to exclude from public view.*

The Supreme Court has repeatedly held that it will independently examine the facts when a denial of constitutional rights is claimed, and that it will not be bound by the conclusions of the courts below. E. g., *Niemotko* v. *Maryland*, 340 U. S. 268, 271; *Norris* v. *State of Alabama* 294 U. S. 587, 589, 590.

In *Joseph Burstyn, Inc.* v. *Wilson, supra*, Mr. Justice Reed concurred in the Court's decision in a separate opinion, in which he said (at pp. 506-7):

> "... Our duty requires us to examine the facts of the refusal of a license in each case to determine whether the principles of the First Amendment have been honored. This film does not seem to me to be of a character that the First Amendment permits a state to exclude from public view."

As noted above, the record here shows that the picture "La Ronde" was admitted through Customs without objection; that it has been widely exhibited in the principal cities of most foreign countries, as well as throughout the United States in cities and towns in some 16 states, as well as in Washington, D. C., and has nowhere been banned, except in New York; and that it has been well received and

has been accorded special awards for merit as well as the favorable acclaim of outstanding dramatic critics.

Thus, *Time* Magazine (October 2, 1951) said concerning this picture (see Record, p. 15):

> "But La Ronde is all of a piece, as any round should be, setting up a mocking harmony of desire and disillusion, vanity, pleasure and deceit. It is never prurient, smirking or pornographic. For all the intimacy of its nuances, the film's approach is dryly detached and completely charming; it spoofs sex rather than exploits it, much as Britain's satiric *Kind Hearts and Coronets* makes sport of murder."

The *Daily News* of Los Angeles (September 21, 1951), quoted *supra*, called it "a total gem of a motion picture . . . told without prudishness and with a deftness, discretion and understanding that make it more moral than most censor-shackled pictures on the subject" (see Record, p. 19).

As Judge Dye has observed, the film's wide exhibition both in this country and abroad, "all without untoward incident or complaint, is a convincing testimonial that it is not inimical to the public peace, welfare and safety."

The mere fact the theme of the picture is that of illicit love, cannot serve to stamp it as censorable. It is settled by prior decisions of the New York courts that the theme alone does not furnish a valid ground for interference by the state. Thus, it was pointed out in *People* v. *Wendling*, 258 N. Y. 451, 455: "A history of prostitution or of sexual life is not *per se* indecent although such a book might easily be so written as to offend decency."

In the present case, as is attested by the reviews quoted above and the other reviews included in the record, there is no basis for complaint as respects the treatment of the theme in this film.

Moreover, it is obvious that it is at least debatable whether this picture can reasonably be stamped as "immoral" or as one that "would tend to corrupt morals". There is certainly a large and respectable segment of public opinion that would not so regard it. To permit the state to ban the showing of such a picture would sanction the repression in advance of any film dealing with a controversial theme, and would thereby clearly encroach on the freedom of expression guaranteed by the First Amendment.

Judge Dye, dissenting in the New York Court of Appeals, pointed out:

> "As the dissenting opinion in the Appellate Division noted, 'La Ronde', according to the Regents, 'deals with illicit love, usually regarded as immoral. But so is murder. The theme alone does not furnish a valid ground for previous restraint. As to its presentation corrupting morals of the public, this issue is highly debatable. The record indicates a vast body of informed opinion to the contrary. Under such circumstances the action of the Regents impinges on petitioner's constitutional rights of free expression'. Since reasonable men may differ on the import and effect of 'La Ronde', it follows that there is not a 'clear and present danger' sufficiently imminent to override the protection of the United States Constitution (*Thornhill* v. *Alabama*, *supra*)."

It is submitted that except for the fact that this picture deals with a theme which some may deem controversial, it is beyond reproach, and that the censorship here imposed by the State is a clear violation of the First Amendment.

4. *The questions presented are of great public importance and are worthy of review.*

Involved in this case are not merely the rights of petitioner, but the right of the public to view such films as they

may see fit. It cannot be overemphasized that the alleged evils complained of by those who would censor this film, are far less dangerous to the community than the vice and danger inherent in banning the free expression and communication of ideas.

As Mr. Justice Douglas declared in his concurring opinion in *Gelling* v. *Texas*, *supra*, at p. 961:

> "If a board of censors can tell the American people what it is in their best interests to see or to read or to hear . . . , then thought is regimented, authority substituted for liberty, and the great purpose of the First Amendment to keep uncontrolled the freedom of expression defeated."

WHEREFORE, it is respectfully submitted that the questions presented by this appeal are substantial and of public importance, and that the appeal herein comes within the proper jurisdiction of the Supreme Court of the United States.

FLORENCE PERLOW SHIENTAG,
Counsel for Appellant.

APPENDIX "A"

OPINIONS RENDERED BY THE COURT OF APPEALS OF THE STATE OF NEW YORK

(May 28, 1953—306 N. Y. 336)

In the Matter of Commercial Pictures Corporation, *Appellant*, against Board of Regents of the University of the State of New York, *Respondent*

Argued January 7, 1953; decided May 28, 1953

Appeal from an order of the Appellate Division of the Supreme Court in the third judicial department, entered June 27, 1952, in a proceeding under article 78 of the Civil Practice Act (transferred to the Appellate Division by an order of the Supreme Court at Special Term, entered in Albany County), which, by a divided court, confirmed a determination of respondent refusing to license the motion picture film "La Ronde".

Frossel, J. The Motion Picture Division of the State Education Department and the Regents of the University of the State of New York have determined that the motion picture "La Ronde" (revised), produced in France, is not entitled to be licensed for public exhibition, upon the ground that it is "immoral" and "would tend to corrupt morals" within the meaning of section 122 of the Education Law of this State. The Appellate Division has confirmed the determination.

The film from beginning to end deals with promiscuity, adultery, fornication and seduction. It portrays ten episodes, with a narrator. Except for the husband and wife episode, each deals with an illicit amorous adventure between two persons, one of the two partners becoming the principal in the next. The first episode begins with a prostitute and a soldier. Since the former's room is ten minutes walk from their meeting place on the street, and the soldier must hurry back to his barracks, they take advantage of the local environment. She informs him that "civilians" pay, but for "boys like you it's nothing". The cycle continues

with the soldier and a parlormaid; the parlormaid and her employer's son; the latter and a young married woman; the married woman and her husband; the husband and a young girl; the girl and a poet; the poet and an actress; the actress and a count, and finally the count and the prostitute. At the very end, the narrator reminds the audience of the author's thesis: "It is the story of everyone".

Petitioner contends that the statute is invalid, in that it imposes a prior restraint upon the exercise of freedom of speech and press, relying principally upon *Joseph Burstyn, Inc.* v. *Wilson* (343 U. S. 495 [1952]), which overruled *Mutual Film Corp.* v. *Ohio Ind. Comm.* (236 U. S. 230 [1915]). In addition, it is contended that the standard here applied is too vague and indefinite to satisfy the requirements of due process. Respondent maintains that the *Burstyn* case (*supra*) is not controlling here and that the standard in question is sufficiently clear and definite. The issues so presented may be posed thus:

(1) Are motion pictures, as part of the press, altogether exempt from prior restraint or censorship?

(2) Do the words "immoral" and "tend to corrupt morals", in section 122 of the Education Law, viewed in the perspective of their legislative setting, fail to provide a standard adequate to satisfy the requirements of due process?

(3) Has the statute been properly applied herein?

1. Our answer to the first question must be in the negative, as it was in the *Burstyn* case in this court (*Matter of Joseph Burstyn, Inc.*, v. *Wilson*, 303 N. Y. 242, 262; see, also, concurring opinion of DESMOND, J., at pp. 263-264). That question was not reached by the Supreme Court of the United States in *Joseph Burstyn, Inc.* v. *Wilson* (343 U. S. 495, *supra*, pp. 502-503, 505-506), and the language employed therein aptly refutes the notion that all media of communication may be grouped under a precise and absolute rule: "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom

to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas. Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." Nor did *Gelling* v. *Texas* (343 U. S. 960), decided the week following on the authority of the *Burstyn* case (343 U. S. 495, *supra*), resolve the issue left open therein.

Insofar, then, as motion pictures tend to present their "own peculiar problems", we think they may properly become the subject of special measures of control. If, as we believe, motion pictures may present a "clear and present danger" of substantive evil to the community (*Schenck* v. *United States*, 249 U. S. 47, 52), then the Legislature may act to guard against such evil, though in so doing it overrides to a degree the right to free expression (*Poulos* v. *New Hampshire*, 345 U. S. 395; *Beauharnais* v. *Illinois*, 343 U. S. 250; *Dennis* v. *United States*, 341 U. S. 494; *Communications Assn.* v. *Douds*, 339 U. S. 382; *Kovacs* v. *Cooper*, 336 U. S. 77; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Schenck* v. *United States*, *supra*; *Fox* v. *Washington*, 236 U. S. 273). As was said in *Crowley* v. *Christensen* (137 U. S. 86, 89): "the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will."

The highest court in the land has recognized the right of the State to act to protect its citizens, even to the extreme of interfering with personal liberty, against the threat of disease (*Jacobson* v. *Massachusetts*, 197 U. S. 11). In that case, the court declared (p. 27): "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." The same court later held that principle broad enough to permit the State to protect itself against the perpetuation of heredity strains of

imbecility through sterilization (*Buck* v. *Bell*, 274 U. S. 200, 207). If it may so act to prevent physical disease or the birth of the "manifestly unfit", may it not likewise act to prevent moral corruption, when the consequences thereof affect not only family life, as we know it in this State and country, but the health and welfare of our people as well?

The problem of preserving individual rights under the Constitution and still securing to the State the right to protect itself is not always an easy one, and it is sometimes difficult to find the proper balance between them. There is no mathematical formula for accommodating the rights of the individual to the good of the community, and we fully recognize that care must be exercised when preserving one not to suppress the other. But there "is no basis for saying that freedom and order are not compatible. That would be a decision of desperation. Regulation and suppression are not the same, either in purpose or result, and the courts of justice can tell the difference" (*Poulos* v. *New Hampshire*, *supra*, p. 408).

Of course it is true that the State may not impose upon its inhabitants the moral code of saints, but, if it is to survive, it must be free to take such reasonable and appropriate measures as may be deemed necessary to preserve the institution of marriage and the home, and the health and welfare of its inhabitants. History bears witness to the fate of peoples who have become indifferent to the vice of indiscriminate sexual immorality—a most serious threat to the family, the home and the State. An attempt to combat such threat is embodied in the sections of the Education Law here challenged. It should not be thwarted by any doctrinaire approach to the problems of free speech raised thereby.

That a motion picture which panders to base human emotions is a breeding ground for sensuality, depravity, licentiousness and sexual immorality can hardly be doubted. That these vices represent a "clear and present danger" to the body social seems manifestly clear. The danger to youth is self-evident. And so adults, who may react with limited concern to a portrayal of larceny, will tend to react quite differently to a presentation wholly devoted to promiscuity, seductively portrayed in such manner as to invite

concupiscence and condone its promiscuous satisfaction, with its evil social consequences. A single motion picture may be seen simultaneously in theatres throughout the State. May nothing be done to prevent countless individuals from being exposed to its vicious effects? To us the answer seems obvious, especially in the light of recent technical developments which render the problem more acute than ever. Now we have commercially feasible three dimensional projection, some forms of which are said to bring the audience "right into the picture". There can be no doubt that attempts will be made to bring the audience right into the bedchamber if it be held that the State is impotent to apply preventive measures.

Such preventive measures necessarily embrace some form of censorship. It is significant that the American motion picture industry has adopted that very method of self-discipline as the effective remedy for immoral motion pictures through its well-known Code of Production Standards. The people of this State should not be compelled to rely upon the motion picture industry's own standards of review; nor, in the case of a foreign film, solely upon the customs officials (U. S. Code, tit. 19, § 1305), for their judgment "in admitting the film did not prevent the state officers from arriving at a different judgment when it came to the exhibition of the film and the granting of a license therefor" (*Eureka Productions* v. *Lehman*, 17 F. Supp. 259, 261, affd. 302 U. S. 634, 304 U. S. 541). They have the right to exercise their own sovereign powers to determine for themselves what motion pictures transgress the bounds of decency and sexual morality laid down by common consent.

As we see it, a statute which operates within limits suited to the attainment of such objectives, as does the enactment here challenged, is a reasonable and valid exercise of the police power. No other method will afford reasonably adequate protection to the public. Moreover, our statute places its administration in the hands of a responsible State agency, rather than with local officers who may at times be subject to petty prejudices or varying provincial views. Neither is it entirely out of place to point out that experience has demonstrated over the years that such

censorship has been and can be carried out without undue hardship or even inconvenience as to motion pictures which meet the standards for public exhibition. We conclude, therefore, that censorship, as such, is not in every case inimical to the rights of free speech and press guaranteed by the Constitution, so far as motion pictures are concerned.

2. We now turn to a consideration of the standard applied herein. Section 122 of the Education Law provides that a motion picture shall not be licensed if it is "obscene, indecent, *immoral*, inhuman, sacrilegious, or is of *such a character that its exhibition would tend to corrupt morals* or incite to crime". We are concerned here only with the words we have italicized. Appellant would have us read them as though they stood alone, without other guide than their dictionary meanings, and thereby find them too broad and vague to serve as a valid standard for the limitation of constitutional rights. The Legislature has not used them in a vacuum, however, but in context with other words and in a setting with other statutes *in pari materia*, as, e.g., sections 1140-a and 1141 of the Penal Law. Moreover, the "use of common experience as a glossary is necessary to meet the practical demands of legislation", and the "requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding" (*Sproles* v. *Binford*, 286 U. S. 374, 393). Even in criminal law, "The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices" (*Jordan* v. *De George*, 341 U. S. 223, 231-232).

Our Legislature has used the word "immoral", or its variants, in numerous other statutes (see Penal Law, §§ 483, 483-a, 483-b, 485, subd. 5; § 485-a, subd. 5; §§ 486, 494, 1140-a, 1141, 1141-a, 1147, 1290, subd. 4; §§ 1944-a, 2460; Education Law, §§ 2212, 3012, subd. 2; § 3013, subd. 2; §§ 3020, 6804; General Business Law, §§ 190, 191, subd. 3). Upon the basis of that standard liberty, civil service tenure, and business licenses have been lost. To adopt the approach urged by petitioner would certainly throw doubt upon many of these enactments.

According to common understanding, the terms "immoral" and "morals" must be taken to refer to the moral standards of the community, the "norm or standard of behavior which struggles to make itself articulate in law" (Cardozo, Paradoxes of Legal Science, pp. 17, 41-42). Thus the standards of any special and particular segment of the whole population are not to control, but those held by the community at large. As was said in *Block* v. *City of Chicago* (239 Ill. 251, 263-264): "There are the shameless and unclean, to whom nothing is defilement and from whose point of view no picture would be considered immoral or obscene. Perhaps others could be found, with no laxity of morals, who pay homage to art and would not regard anything as indelicate or indecent which had artistic merit, and would look upon any person entertaining different sentiments as of inferior intelligence, without proper training on the subject and blinded with bigotry. Both classes are exceptional, and the average person of healthy and wholesome mind knows well enough what the words 'immoral' and 'obscene' mean and can intelligently apply the test to any picture presented to him."

As applied to the general moral standards of the community, it is urged that such a standard may be too broad, although standards equally broad have been successfully applied. The term "moral turpitude" has been held adequate to satisfy even the strict rule applicable to criminal statutes, with the comment that "doubt as to the adequacy of a standard in less obvious cases does not render that standard unconstitutional" (*Jordan* v. *De George*, 341 U. S. 223, 232, supra). So, too, the term "good moral character", as used in the immigration and nationality laws, must frequently be applied by the courts. In so doing, their measure is the "common standards of morality" prevalent in the community (*Estrin* v. *United States*, 80 F. 2d 105) or the "common conscience" of the community (*Johnson* v. *United States*, 186 F. 2d 588, 590).

It is not a valid criticism that such general moral standards may vary slightly from generation to generation. Such variations are inevitable and do not affect the application of the principle at a particular period in time (see *Parmelee*

v. *United States*, 113 F. 2d 729). Neither may a standard be criticized on the ground that individual opinions may differ as to a particular application thereof. There is no principle or standard not subject to that infirmity, including the most specific provisions of the First Amendment (*Rochin* v. *California*, 342 U. S. 165, 170).

We are not unmindful of the fact that the provisions here in question, considered in the abstract, may be deemed broad, even as limited by common usage. Even in such case, however, it has been said that language "does not stand by itself * * * but is part of the whole body of common and statute law * * * and is to be judged in that context" (*Musser* v. *Utah*, 333 U. S. 95, 97). In the case now before us, we should not "parse the statute as grammarians or treat it as an abstract exercise in lexicography" (*Beauharnais* v. *Illinois*, 343 U. S. 250, 253, *supra*), but should read it as it was meant to be read by the Legislature that enacted it. In many of the statutes in which our Legislature has used the word "immoral" it obviously refers to sexual immorality. It is our view that it is used similarly in section 122 of the Education Law, as can be perceived in the statute itself, and in the construction put upon it, not only by the Regent herein, but by this court as well.

Turning to the statute, it will be noted that there is a related usage—a gradation of language, proceeding from "obscene" to "indecent" to "immoral", words frequently used together in statutory enactments, and thence to generically different categories: "inhuman" and "sacrilegious". That juxtaposition colors the word "immoral" and justifies the application of the rule *ejusdem generis*, particularly when coupled with the subsequent expression "tend to corrupt morals", as was done here. (See McKinney's Cons. Laws of N. Y., Book 1, Statutes [1942 ed.], § 239; Penal Law, §§ 1140-a, 1141, where "obscene, indecent, immoral" are likewise grouped together; *People* v. *Wendling*, 258 N. Y. 451; *People* v. *Muller*, 96 N. Y. 408; *Regina* v. *Hicklin*, L. R. 3 Q. B. 360, 369-370; see, also, *Eureka Productions* v. *Lehman*, 17 F. Supp. 259, affd. 302 U. S. 634, 304 U. S. 541, *supra*; *Swearingen* v. *United States*, 161 U. S. 446, 451.)

Apart from these considerations, it would appear that we have already construed the statute in precisely this manner. Section 1140-a of the Penal Law, and related sections, have been held to apply to motion pictures even prior to their express inclusion therein (*Hughes Tool Co.* v. *Fielding*, 297 N. Y. 1024). The theory of that decision was that the Education Law and the Penal Law constitute complementary parts of a related whole. As used in the said Penal Law sections, the word "immoral" clearly relates to sexual immorality. Accordingly, its meaning in the Education Law should be the same, and the unpublished minutes of the proceedings of this court indicate that it was so treated in that case.[1]

Viewing the statute under consideration in its proper setting, then, the words "immoral" and "tend to corrupt morals" as used therein relate to standards of sexual morality. As such they are not vague or indefinite. In this sense they are kindred to "obscene" and "indecent", of which we have said: "They are words in common use, and every person of ordinary intelligence understands their meaning, and readily and in most cases accurately applies them to any object or thing brought to his attention which involves a judgment as to the quality indicated. It does not require an expert in art or literature to determine whether a picture is obscene or whether printed words are offensive to decency and good morals." (*People* v. *Muller*, *supra*, pp. 410-411.) (See, also, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572, *supra*.) It should be remembered that we are not here dealing with a moral concept about which our people widely differ; sexual immorality is condemned throughout our land.

3. The remaining question is whether the statute has been properly invoked against the motion picture "La Ronde". We have already noted that it is concerned solely with promiscuous sex relations and are told: "It is the story of

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[1] After our decision therein, section, 1141 of the Penal Law was amended to exempt from its provisions moving picture films licensed by the State Department of Education (L. 1950, ch. 624). If, therefore, the State be required to grant a license here, petitioner will be immune from criminal prosecution.

everyone". Although vulgar pornography is avoided, suggestive dialogue and action are present throughout and not merely incidentally, depicting promiscuity as the natural and normal relation between the sexes, whether married or unmarried. Can we disagree with the judgment that such a picture will tend to corrupt morals? To do so would close our eyes to the obvious facts of life. The story is patterned after the book, which was condemned for obscenity in *People* v. *Pesky* (230 App. Div. 200, 202, affd. 254 N. Y. 373). There the Appellate Division stated "there was nothing to it except a description of the licentious * * * without a single redeeming feature." The author of the original work himself felt that it "might very well be misunderstood and misinterpreted", and so it was privately published. Even among the favorable reviews submitted by petitioner were such comments as:

"The details are concrete enough to make one blush unseen * * *.

"With something less than tremulous delicacy, he [the director] and his associate artists, speak quite freely upon the joys and woes of amorous adventure."

It may also be noted that among the industry's self-imposed limitations pertaining to sex are the following: "The sanctity of the institution of marriage and the home shall be upheld. Pictures shall not infer that low forms of sex relationship are the accepted or common thing." (Code of Production Standards, "Particular Applications" II, 1950 Year Book of Motion Pictures, pp. 920-922.) "La Ronde" infers just that. In the minds of American motion picture producers, then, such a picture as is now before us would tend to "lower the moral standards of those who see it" (Code of Production Standards, "General Principles" 1).

We think it plain that we cannot say that the Regents were wrong in refusing the license herein. It has been suggested that we should form an independent judgment as to each picture which might become the subject of controversy between the distributor and the Regents, but that would simply mean that the powers granted to the Regents by statute could be arrogated to this court by judicial action. In the scheme of things, there must be some agency to which

is entrusted the fact-finding power. In criminal cases it is the jury; in matters of administration generally, it is the administrative agency; in motion picture review, it is the Regents. No constitutional argument can be presented for having it otherwise. If the Regents err in law, we sit to correct them. If they must exercise their fact-finding powers in a close case and do so honestly and fairly, then due process has been observed (see *Nash* v. *United States*, 229 U. S. 373, 377).

It is not for us to question the wisdom of placing that fact-finding power in the hands of the Regents rather than the courts. Neither do we think any such debate could be very productive, for strong and persuasive arguments can be made to the effect that an experienced administrative body is better qualified than a court to judge the effect of a particular motion picture, and that we of the judicial branch should not be left "at liberty to substitute our judgment for theirs, or to supersede their function as the spokesmen of the thought and sentiment of the community in applying to the [motion picture] * * * the standard of propriety established by the statute" (*People* v. *Pesky*, *supra*, pp. 373-374).

In summary, we conclude that motion pictures may be censored, upon proper grounds, and that sexual immorality is one such ground. The standard "immoral" and "tend to corrupt morals" embodied in the statute and here applied relates to sexual immorality, and the Regents had the right to find that the motion picture in question falls within the prohibited category.

The order appealed from should be affirmed, with costs.

DESMOND, J. (concurring):

I concur for affirmance.

We review the refusal by the Board of Regents of the State of New York, acting under Sections 120 and 122 of the State Education Law, to license the exhibition in New York State of the motion picture "La Ronde". Section 122 directs that every submitted motion picture film be licensed "unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to

crime". The stated ground for the Regents' refusal here was that "La Ronde" was "immoral and tended to corrupt morals". The film depicts a series of illicit sexual adventures, nothing more, and is a close adaptation, for the screen, from Schnitzler's novel "Reigen" which, translated into English as "Hands Around", was held to be criminally obscene in *People* v. *Pesky* (230 App. Div. 200, affd. 254 N. Y. 373). We have seen this motion picture, and, while we agree with appellant's counsel that it "has a distinguished cast and a brilliant production", we find, too, that its only discoverable theme is this: that everyone is sexually promiscuous, and that life is just a "round" of sexual promiscuity. It would be understatement to apply to this photoplay the characterization given another film in *Matter of Eureka Productions* v. *Byrne* (252 App. Div. 355, 357) that it "unduly emphasizes the carnal side of the sex relationship". This picture has no other content.

On this appeal, it seems to us, these three questions of law are to be answered, and in this order:

1. Is all pre-censorship of motion pictures violative of the First Amendment to the Federal Constitution?

2. If not, is the New York statute unconstitutional, for lack of precise standards, at the point where it permits the banning of a picture on a charge that it is "immoral" or "tends to corrupt morals"?

3. If questions 1 and 2 are both answered in the negative, was there reasonable basis here for the Regents' finding that "La Ronde" is immoral and tends to corrupt morals?

Our answers are these:

1. The New York State's motion picture censorship statute was enacted in 1921 (L. 1921, ch. 715), was held constitutional by this court in 1923 (*Pathe Exch.* v. *Cobb*, 236 N. Y. 539), and except as to its use of "sacrilegious" as one of its standards, has never been held invalid. Our law, under which thousands of pictures have been licensed or denied licenses, is typical of the eight State statutes and perhaps seventy-five municipal ordinances that have made their appearance since the first such enactment: the Chicago ordinance of 1907 (*Block* v. *City of Chicago*, 239 Ill. 251).

In the Federal courts, such censorship statutes were, beginning about 1915, held not to contravene the First Amendment, which, it was at that time held, did not apply to motion pictures, since the exhibition thereof was then regarded as a mere part of the business of providing entertainment in theatres (see *Mutual Film Corp.* v. *Ohio Ind. Comm.*, 236 U. S. 230; *Mutual Film Co.* v. *Ohio Ind. Comm.*, 236 U. S. 247; *Mutual Film Corp.* v. *Kansas*, 236 U. S. 248). There were numerous similar holdings in various Federal and State courts. Appreciating the delicacy of the questions inherent in all censorship, but realizing, too, the danger, especially to the immature, of the free showing of demoralizing films (New York since 1909 has, for instance, limited attendance of children at motion picture theatres—see Penal Law, § 484, subd. 1), this sovereign State put the licensing power in one of its most powerful and most respected governmental bodies, the Board of Regents, a "citizens' board" which is at the head of the State's educational system. Censorship in New York is, therefore, carried on at the highest levels of responsible State Government.

In 1951, this court re-examined, in *Matter of Joseph Burstyn, Inc.*, v. *Wilson* (303 N. Y. 242) the question of the constitutionality of pre-censorship of films and found no reason to change our earlier decision. Later, the Supreme Court of the United States, in the same *Burstyn* case (343 U. S. 495) decided for the first time (it had intimated this result in 1948 in *United States* v. *Paramount Pictures*, 334 U. S. 131, 166) that expression by means of motion pictures is included within the free speech and free press guarantee of the First and Fourteenth Amendments. Going further, the highest court held that the word "sacrilegious" provided no valid test or standard, since it subjected films to "conflicting currents of religious views" (*supra*, p. 504). But the Supreme Court found it unnecessary, in *Burstyn*, to decide whether a State may censor motion pictures under a clearly drawn statute designed and applied to prevent, for instance, the showing of obscene films (pp. 505-506). Thus the *Burstyn* decision, while it ruled out "sacrilegious" as a permissible censoring standard, certainly did not strike down, completely, the police power of the State to precensor motion pictures. "It does not follow" said the court

(*supra*, p. 502), "that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places." Historically, of course, the First Amendment has never provided immunity for every possible use of language (*Robertson* v. *Baldwin*, 165 U. S. 275, 281; *Fröhwerk* v. *United States*, 249 U. S. 204, 206).

The constitutional doctrine which forbids pre-censorship of the press (*Near* v. *Minnesota*, 283 U. S. 697), expresses, primarily, the insistence of the American people that the publication of ideas and opinions, especially as to governments, public officers, and public questions should not be restrained here, as they had been elsewhere (see *Patterson* v. *Colorado*, 205 U. S. 454, 464, 465). And the doctrine itself has been subject always to an exception, as to publications which tend to corrupt morals or incite to crime or vice (see *People* v. *Gitlow*, 234 N. Y. 132; *People* v. *Most*, 171 N. Y. 423, 431; *Pathe Exch.* v. *Cobb*, 202 App. Div. 450, aff'd. 236 N. Y. 539, *supra*; *Patterson* v. *Colorado*, 205 U. S. 454, *supra*; *Schenck* v. *United States*, 249 U. S. 47; *Gitlow* v. *New York*, 268 U. S. 652, 666; *People* v. *Croswell*, 3 Johns. Cas. 336, 392 [1804]; Cooley on Constitutional Limitations [7th ed.], pp. 604-605). That exception usually finds application in post-punishment rather than pre-censorship, but the system of distribution and showing of motion pictures makes it feasible, if not necessary, to examine and license or refuse to license them before exhibition to audiences. We realize, as does everyone else, and as did the Supreme Court in 1915 in *Mutual Film Corp.* v. *Ohio Ind. Comm.* (*supra*) and in 1952 in *Joseph Burstyn, Inc.* v. *Wilson* (*supra*) that motion pictures have vast potentialities for evil, and we know, as practical people, that there is no effective way to suppress the damaging ones except by a system of censorship (see *Superior Films* v. *Department of Educ.*, 159 Ohio St. 315, April 29, 1953). "Justification for upholding a censorship statute couched in indefinite terms may lie in the interest to be protected and not in semantics" (37 Minn. L. Rev. 211). So, unless and until so constrained by higher judicial authority, we will not say that the police power of our State cannot be used to keep such evil from our people.

2. Next, we answer the question as to the sufficiency, as a standard for licensing, of the statutory language: "immoral" and "tend to corrupt morals". We know that "immoral" is rather a sweeping term, of large and perhaps not mathematically delimited meaning, but we know, to, that if statutes could use only scientifically exact terminology, much of our statute law would be invalid. Words and phrases like "moral", "immoral", "good moral character", "impairing morals", etc., abound in New York statutes (see, for instance, Social Welfare Law, § 448; Penal Law, §§ 483, 485-a, 486, 494, 580, subd. 6; §§ 1140-a, 1141, 1141-a, 1145, 1147, 1148, 1933; Education Law; §§ 2212, 3012, 3013, 3020, 6804; General Business Law, §§ 190, 191; Agriculture and Markets Law, §§ 57, 57-a, and zoning statutes such as Village Law, § 175, and Town Law, § 261). In some of those statutes, the verbiage, because of context, limits itself to sexual morals—not so here, we think. Sexual impurity is only one form of immorality (see *Swearingen* v. *United States*, 161 U. S. 446, 451). This picture "La Ronde" could be classed as "immoral" in the narrower sense, too, but the statutory meaning here is the usual or dictionary one (including the law dictionaries), and its reference is to the generally accepted civilized code of morals—its prohibition is of material "*contra bonos mores*". That, too, is the clearly intended meaning in several other censorship statutes (*Block* v. *City of Chicago*, 239 Ill. 251, 264, *supra*; *People ex rel. First Nat. Pictures* v. *Dever*, 242 Ill. App. 1; *Schuman* v. *Pickert*, 277 Mich. 225, 229; see *United States* v. *One Obscene Book Entitled "Married Love"*, 48 F. 2d 821, 823). If it meant, in our statute, sexually vicious only, the word "immoral" would be tautological and repetitious, since it is there coupled with "obscene" and "indecent". And why should our Legislature have placed a ban on one kind, only, of immorality? "Immoral" (or its antonym "moral") is a listed standard in at least five (besides New York) State motion picture censorship laws (those of Pennsylvania, Ohio, Virginia, Kansas, Maryland). Indeed, the very word "moral" in the Ohio law was taken in its usual broad sense and held to be sufficiently definite for these purposes, in *Mutual Film Corp.* v. *Ohio Ind. Comm.* in those

words (236 U. S. 230, 245-246, *supra*): "The objection to the statute is that it furnishes no standard of what is educational, moral, amusing or harmless, and hence leaves decision to arbitrary judgment, whim and caprice * * *. But the statute by its provisions guards against such variant judgments, and its terms, like other general terms, get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies." We think the Supreme Court there must have read "moral" in the meaning we give it here, and the Supreme Court there pointed out that, unless words of such seeming generality were valid in statutes, government itself would become impossible. There can be no objection to the use, in a statute, of a word like "immoral" which includes many things, all of which are intended by the Legislature to be covered; otherwise, there would be barred from statutory use such customary verbiage as "fraudulent", "due", "negligent", "arbitrary", "reasonable", etc. Legislatures use such words not "vaguely" but inclusively. That a word has many meanings, one or more of which are definitely pointed up by the surrounding verbiage, is no more reason for barring its use than if the word had one meaning only. It is too late to change the common usage of the word "immoral", or to ascribe absurdity to it, so as to invalidate a statute. Although the Supreme Court, in *Burstyn (supra)*, reversed that part of the *Mutual Film Corp.* holding which deals with the free speech question, *Mutual's* rule as to the propriety of "moral" or "immoral", as a motion picture censorship standard in Ohio remains undisturbed, so far as we know. So the Ohio Supreme Court pointed out, on April 29, 1953, in *Superior Films* v. *Department of Educ.* (159 Ohio St. 315, *supra*).

Long ago our court (*Lyon* v. *Mitchell*, 36 N. Y. 235, 238) approved definitions of "morality" as " 'that science which teaches men their duty, and the reason of it' " and as " 'the rule which teaches us to live soberly and honestly. It hath four chief virtues, justice, prudence, temperance and for-

titude.' " In that opinion, in 1867, our great predecessors on this bench wrote that: "Sound morals, as taught by the wise men of antiquity, as confirmed by the precepts of the gospel * * * are unchangeable. They are the same yesterday and to-day." We see no reason to retreat from those ideas. "We are a religious people whose institutions presuppose a Supreme Being" (*Zorach* v. *Clauson*, 343 U. S. 306, 313). Our Federal and State Constitutions assume that the moral code, which is part of God's order in this world, exists as the substance of society. The people of this State have acted through their Legislature, on that assumption. We have not so cast ourselves adrift from that code, nor are we so far gone in cynicism, that the word "immoral" has no meaning for us. Our duty, as a court, is to uphold and enforce the laws, not seek reasons for destroying them.

3. If there be validity to our answers above numbered 1 and 2, we will have no difficulty with the third question, that is, as to whether the Regents were justified in finding that "La Ronde" is immoral, and tends to corrupt morals. It is of no pertinence here that great literature of all ages, including the Sacred Scriptures, abounds with descriptions of rapes, fornications and adulteries. The difference here is that the whole theme, motif and subject matter of this film, its dominant and sole effect, is sexual immorality. The totality of it, and every part of it, is sexual immorality. The point is not that it depicts immoral conduct—it glorifies and romanticizes it, and conveys the idea that it is universal and inevitable. Are we as a court to say as matter of law that it does not thus "tend to corrupt morals"? This court should hold that the State of New York may prevent the publication of such matter, the obvious tendency of which is "to deprave or corrupt those whose minds are open to such immoral influences, and who might come into contact with it" (*People* v. *Muller*, 96 N. Y. 408, 411, following *Regina* v. *Hicklin*, L. R. 3 Q. B. 360, 369-370; see *People* v. *Doubleday & Co.*, 297 N. Y. 687, affd. 335 U. S. 848; *United States* v. *Dennett*, 39 F. 2d 564; *United States* v. *Levine*, 83 F. 2d 156). Such is the valid State policy and purpose, and we enforce it by affirming this Regents' determination.

The order should be affirmed, with costs.

CONWAY, J. (concurring). I am in entire accord with the opinion of Judge FROESSEL but believe that we may properly go further and therefore I fully agree also with the view stated by Judge DESMOND in his concurring opinion.

DYE, J. (dissenting). By the decision about to be made, a majority of this court approves as a valid enactment, the New York motion picture licensing statute, notwithstanding that it provides for censorship in advance, which as we read it, constitutes an infringement of the basic civil right of freedom of speech and publication contrary to due process (U. S. Const., 1st, 5th, 14th Amendts.; N. Y. Const., art. I, §§ 6, 8; Education Law, § 122). I must therefore record my dissent.

The question arises out of the refusal of the State Board of Regents to approve the issuance of a license to permit the showing of the motion picture film "La Ronde" for the reason, couched in the language of the statute, "that the said film is 'immoral' and that its exhibition 'would tend to corrupt morals' within the meaning of Section 122 of the Education Law."

The case is before us in an appeal as of right from an order of the Appellate Division, Third Judicial Department, entered in a proceeding under article 78 of the Civil Practice Act, at the instance of this appellant (Education Law, § 124), and heard by the Appellate Division in the first instance (Civ. Prac. Act, § 1296). When the petitioner, a California corporation and sole owner of the distribution rights of the said picture in the United States, first applied for an exhibitor's license (Education Law, §§ 120-122) the director of the motion picture division refused it on the ground that the picture was "immoral" and "would tend to corrupt morals". Following established practice in such circumstances, the petitioner re-edited the film and re-submitted its application, but even so the director again refused to issue a license. A review of his determination was then had before a three-man committee of the State Board of Regents (Education Law, § 124), which, after viewing the picture, as we have said, confirmed the director's determination. In the court below

the confirmation of the determination and the dismissal of the proceedings was on the ground that the applicable statute was a valid enactment and that confirmation was required under familiar doctrine limiting the function of a reviewing court whenever there is "warrant in the record and a reasonable basis in law" for the board's determination. In other words, if the issue is debatable, the action of the administrative body is to be upheld (*Matter of Mounting & Finishing Co.* v. *McGoldrick*, 294 N. Y. 104). However correct that may be as a rule of thumb in the review of administrative cases turning on a controverted issue of fact, it is inapplicable in a case involving fundamental civil rights secured by the State and Federal Constitutions for then a determination must be so clear, as the dissenting Judges in the court below observed, "that any conclusion to the contrary would not be entertained by any reasonable mind. It is wholly inconsistent with a constitutional guarantee to leave any debatable issue of morals, involved in any form of protected expression, to the final decision of an administrative agency." *Matter of Commercial Pictures Corp.* v. *Board of Regents*, 280 App. Div. 260, 265.) In such a situation "the reviewing court is bound to re-examine the whole record" in the light of the challenge made (*Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Universal Camera Corp.* v. *Labor Bd.*, 340 U. S. 474; *Niemotko* v. *Maryland*, 340 U. S. 268; *Norris* v. *Alabama*, 294 U. S. 587).

Since the decision in *Joseph Burstyn, Inc. v. Wilson* (343 U. S. 495, *supra*, revg. 303 N. Y. 242) there is no longer any doubt but that motion picture films enjoy the same constitutional freedom and protection accorded other media of human expression (cf. *United States* v. *Paramount Pictures*, 334 U. S. 131; *Stromberg* v. *California*, 283 U. S. 359) and this is so even though motion pictures as such are primarily designed to entertain at exhibitions conducted for private profit and even though motion picture films as such possess "a greater capacity for evil, particularly among the youth of a community, than other modes of expression" (*Burstyn, supra*, p. 502).

In the *Burstyn* case (*supra*) the Board of Regents had refused a license to show the motion picture entitled "The Miracle" on the ground that it was "sacrilegious" within the meaning of section 122 of the Education Law. When the case was in this court we approved such determination in reliance on the validity of regulation by prior censorship in accordance with our decision in *Pathe Exch. v. Cobb* (236 N. Y. 559, affg. 202 App. Div. 450). That decision, in turn, had followed *Mutual Film Corp. v. Ohio Ind. Comm.* (236 U. S. 230), *Mutual Film Co. v. Ohio Ind. Comm.* (236 U. S. 247), and *Mutual Film Corp. v. Kansas* (236 U. S. 248), in which the United States Supreme Court had approved as a valid enactment in Ohio, a pre-censorship statute.

We note that in deciding the *Burstyn* case (*supra*, pp. 505-506) the United States Supreme Court found it unnecessary to pass on the issue of prior censorship preferring to leave such question until presented "under a clearly drawn statute designed and applied to prevent the showing of obscene films" since the term "sacrilegious", the sole standard under attack, afforded an adequate basis for reversal. Nonetheless, that is not to say the learned court was unmindful of the iniquity of prior restraint which (in the field of publication) they long before had ruled (p. 503) was an "infringement upon freedom of expression to be especially condemned" (*Thomas v. Collins*, 323 U. S. 516; *Lovell v. Griffin*, 303 U. S. 444; *Grosjean v. American Press Co.*, 297 U. S. 233; *Near v. Minnesota*, 283 U. S. 697; *Patterson v. Colorado*, 205 U. S. 454).

Since the courts no longer see any distinction separating motion picture film from the protection accorded other media of communication, it follows as a matter of reason and logic that prior censorship of motion pictures is as to them as it is in other fields of expression, a denial of due process. In saying this we are, of course, mindful of the correlative obligation that in its exercise and enjoyment such right is not unlimited and absolute at all times and under all circumstances (*Chaplinsky v. New Hampshire*, 315 U. S. 568; *Cox v. New Hampshire*, 312 U. S. 569) but that such freedom may properly be restrained when inimi-

cal to the public welfare (*Gitlow* v. *New York*, 268 U. S. 652) and the State may punish its abuse (*Near* v. *Minnesota*, *supra*). It is equally well established that before such limitation may be imposed the abuse complained of is to be examined in all cases to determine whether it is of such a nature "as to create a clear and present danger [and] will bring about the substantive evils that Congress has a right to prevent" (*Schenck* v. *United States*, 249 U. S. 47, 52), which danger should be "apparent and imminent" (*Thornhill* v. *Alabama*, 310 U. S. 88) such, for example, as a threat to overthrow the government by unconstitutional means (*Dennis* v. *United States*, 341 U. S. 494). By the same token, when public safety is involved, its restraint will be approved as a proper exercise of the police power (*Feiner* v. *New York*, 340 U. S. 315, affg. 300 N. Y. 391; *Kovacs* v. *Cooper*, 336 U. S. 77) or, to state it differently, there must be present some "overriding public interest" (see dissenting opinion per FULD, J. in *Matter of Joseph Burstyn, Inc.*, v. *Wilson*, *supra*, p. 269; Thornhill v. *Alabama*, *supra*), mere fear of possible injury is not enough (*Terminiello* v. *Chicago*, 337 U. S. 1).

Having in mind these well-recognized principles, it is pertinent to inquire what if anything there is about "La Ronde" that requires denial of constitutional safeguards and the imposition of the sanction of prior restraint. Is it because a showing would offend against some overriding need—would constitute a danger clear and present? We think not.

According to the record, the picture "La Ronde" since its admission through Customs without objection (U. S. Code, tit. 18, § 1462; U. S. Code, tit. 19, § 1305) has been exhibited throughout the United States in cities and towns in the States of Arizona, California, Colorado, Connecticut, Delaware, Florida, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Missouri, New Jersey, Oklahoma, Oregon, Texas and Washington, D. C. Nowhere has the showing of "La Ronde" been banned except in New York. While experience elsewhere is not binding on the courts in New York, the opinions of qualified critics may be considered (*United States* v. *One Book Entitled Ulysses*, 72

F. 2d 705). We deem it significant that in the States of Louisiana (La. Rev. Stat., tit. 4, §§ 301-307) and Massachusetts (Mass. Ann. Laws, ch. 136, §§ 2-4) having censorship laws, though to be sure, not as comprehensive as that in New York, the picture has had an unhampered showing as well as in places where municipal codes are in effect such as Detroit, Michigan; Salem, Oregon and Houston, Texas, to mention a few, a circumstance indicating that in a large segment of society the picture is not offensive per se. Such a showing in other States and cities of this country, where prior restraint was available and not invoked, and elsewhere having no such statutes, all without untoward incident or complaint, is a convincing testimonial that it is not inimical to the public peace, welfare and safety. On the contrary, we are told that the showing elsewhere has been well received and has elicited favorable acclaim by the premier dramatic critics of eminent publications in which we may read:

"*La Ronde* is all of a piece, as any round should be, setting up a mocking harmony of desire and disillusion, vanity, pleasure and deceit. It is never prurient, smirking or pornographic. For all the intimacy of its nuances, the film's approach is dryly detached and completely charming; it spoofs sex rather than exploits it, much as Britain's satiric *Kind Hearts and Coronets* makes sport of murder." (*Time* Magazine, Oct. 22, 1951.)

"Here is a lovely motion picture, a gay, a glad, a sad, a sentimental movie * * * about Vienna at the turn of the century, the Vienna of candlelight and carriages, of wine, women and waltzes. * * * All this is told with a combination of irony, candor and gentleness that makes of the whole a total gem of a motion picture. * * * a picture about illicit love, but it is told without prudishness and with a deftness, discretion and understanding that make it more moral than most censor-shackled pictures on the subject." (*Daily News*, Los Angeles, Sept. 21, 1951.)

"The * * * players * * * represent the cream of France's romantic actors." (*The Evening Star*, Washington, D. C., July 28, 1951.)

"The players * * * are among the cream of French talent and virtually flawless here." (*The Los Angeles Times*, Sept. 21, 1951.)

"* * * a splendid and glittering cast that includes Anton Walbrook, Gerard Philipe, Isa Miranda, Dannielle Darrieux, Daniel Gelin, Simone Simon, Jean-Louis Barrault, Fernand Gravet, and Odette Joyeux. * * * their portrayals have that quality of nuance that makes a second viewing almost obligatory. * * * Through the strata of a world-weary Viennese society the story spirals, until we find we have arrived at much the same point from which we have begun. It's more sad than bitter, more ironic than funny, and there's some haunting little message underneath it all, though, to be sure, you are never quite told what it is. * * * delicately done and in excellent taste." (*Saturday Review of Literature*, Nov. 10, 1951.)

In addition, it has been shown in the principal cities of most foreign countries and has received special recognition for merit from several motion picture academies as, for instance, in Cuba as the best film of 1951, by the British Film Academy in London as the best film from any source, British or foreign, and in 1952, a nomination for an award at the Hollywood Academy.

Nonetheless if it may be said that prior censorship serves a necessary and needful public purpose warranting the abridgement of the right of free speech and press, it remains for the statute under review to meet the test of definiteness required to constitute a valid delegation of legislative power to an administrative agency. Unless it does so, it cannot be regarded as the "clearly drawn statute" envisioned by the Supreme Court (*Burstyn, supra*, p. 506; *Kunz* v. *New York*, 340 U. S. 290; *Winters* v. *New York*, 333 U. S. 507; *Connally* v. *General Constr. Co.*, 269 U. S. 385; *Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81) and we too apply such principle whenever needed (*Packer Collegiate Inst.* v. *University of State of N. Y.*, 298 N. Y. 184; *Matter of Fink* v. *Cole*, 302 N. Y. 216; *Matter of Small* v. *Moss*, 279 N. Y. 288).

It is indeed significant that when the Legislature enacted the censorship statute under review it omitted to provide any criteria or standards to guide the Board of Regents in performing the administrative functions required of it, but was content to use language of broad and general import leaving its meaning and application to the individual judgment of its director of the motion picture division in the first instance (§ 122) or if denied, to a committee of three members of the board (§ 124).

Indefiniteness affords opportunity for arbitrariness, the tendency to which is nowhere better illustrated than in the field of administrative law. It is for this reason that delegation of legislative power is carefully scrutinized, whether to a private agency (*Matter of Fink* v. *Cole, supra*) or to a governmental agency (*Packer Collegiate Inst.* v. *University of State of N. Y., supra; Matter of Small* v. *Moss, supra*). If this is not enough, then the board itself has been equally delinquent in failing to adopt rules and regulations for the guidance of its motion picture division in the exercise of censorship powers, but has left the generality of the statutory language to gain precision "from sense and experience" (*Mutual Film* cases, *supra*), a method no longer approved (*Burstyn*), and is particularly objectionable here as it vests unlimited restraining control over motion pictures in a censor limited only by what an individual director of the motion picture division or, upon review, by what three members of the board itself happen to think about a particular picture at a given time (cf. *Winters* v. *New York, supra; Gelling* v. *Texas*, 343 U. S. 960). Such lack, it goes without saying, leaves an appellate court at a very great disadvantage. We do not know what standards guided the agency in making its determination. To supply such legislative omission by judicial fiat is not permissible under the division of governmental powers as fixed by the Constitution. It has long been recognized that courts may not usurp the legislative function under the guise of adjudication. The evils of allowing an administrative agency, however worthy its purpose, to function without proper legislative guidance is well illustrated by this very case. The lack of proper stand-

ards and guidance has led the State Board of Regents into a most surprising record of inconsistency and illustrates at first hand the evils of slap-dash censorship. For instance, we do not know whether they apply the terms "immoral" and "tend to corrupt morals" to pictures dealing with sex impurity or to pictures dealing with any matter which could be deemed *contra bonos mores*. Here we have a picture which, concededly, is not obscene or indecent but which nonetheless is banned from a New York showing because deemed "immoral" and its exhibition "would tend to corrupt morals" which is difficult to reconcile with the issuance of permits to show other pictures dealing not only with illicit love but also crime such as Dreiser's "American Tragedy" (based on *People* v. *Gillett*, 191 N. Y. 107), "A Street Car Named Desire" and "The Outlaw", and those of a lurid type whose blow-up posters called attention to "Outcast Girls", "Female Sex", "Naked Realism". The case at hand is the only instance brought to our attention where denial has been based solely on the term "immoral" which the Regents applied because "promiscuity" is the central theme. True, the term "immoral" has been used in numerous other instances but always, we note, in juxtaposition with the word "obscene" or "indecent". The term "obscene" as used in the criminal statutes, has been interpreted in the United States Supreme Court as meaning the subject matter must be of a "lewd, lascivious and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall" (*Swearingen* v. *United States*, 161 U. S. 446, 451), and in our own court we have said that the test of an obscene book is whether "the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to such immoral influences, and who might come into contact with it" (*People* v. *Muller*, 96 N. Y. 408, 411, following *Regina* v. *Hicklin*, L. R. 3 Q. B. 360, 369-370; *People* v. *Doubleday & Co.*, 297 N. Y. 687, affd. 335 U. S. 848).

The term "immoral" when not connected with "obscene" —and here it is not—for indeed the motion picture "La Ronde" was not banned upon the ground of obscenity—has

a variety of meanings varying according to time, geography and to some extent, subjective judgment (Cardozo, Paradoxes of Legal Science; *Matter of Foy Productions* v. *Graves*, 253 App. Div. 475; *Parmelee* v. *United States*, 113 F. 2d 729; *United States* v. *Kennerley*, 209 F. 119). The lexicographers have defined "immoral" as the opposite of moral (Oxford Dictionary) which term may and does include illicit sexual behavior (Funk & Wagnalls) but the meaning is not limited to sex impurity but includes in addition offenses hostile "to public welfare" (Black's Law Dictionary), "inimical to rights or * * * interests of others", "corrupt", "depraved" and sometimes "unprofessional" conduct or (42 C.J.S., pp. 395-396), to state it broadly, anything *contra bonos mores*.

Resort to the criminal statutes dealing with obscenity and the cases construing such statutes are of little help in solving our present problem for here we deal with a licensing statute authorizing restraint in advance. In the one we deal with evidentiary requirements sufficient to support the conviction beyond "reasonable doubt" while in the other when the issue is debatable "some" evidence is sufficient. In the one the proof must meet the standards of the hearsay rule to assure competency, relevance and materiality while in the other formal rules of evidence may be dispensed with entirely. Criminal statutes are designed to apprise the citizen of what constitutes an offense against society in advance of the fact. The term "immoral" as used in this pre-censorship statute, without more, affords little help in advising the citizen of what constitutes a violating offense. All that the petitioner has to guide him here is the circumstance that wherever shown in the United States, except New York, the picture "La Ronde" does not offend.

To strike the term "immoral" and the words "tend to corrupt morals" from the statute as indefinite and undefinable will work no serious result. For years New York State has had statutes dealing with obscenity and indecency broad enough to sanction "after the fact" criminal prosecution and punishment, application of which has successfully regulated the publication and sale of books

and periodicals without prior censorship (Penal Law, § 1141 cf. *Winters* v. *New York, supra*), as well as statutes sanctioning the punishment of persons presenting obscene, indecent, immoral or impure drama, plays or exhibition shows or entertainment (Penal Law, § 1140-a).

In addition, the word "obscene", when compared with the word "immoral" has a clear and authoritative judicial definition. The Federal standard is whether the book taken as a whole has a "libidinous effect" (*Hannegan* v. *Esquire, Inc.*, 327 U. S. 146; *United States* v. *One Book Entitled Ulysses*, 72 F. 2d 705, *supra*). In New York the test is "whether the tendency of the [work] is to excite lustful and lecherous desire" (*People* v. *Wendling*, 258 N. Y. 451, 453; *People* v. *Eastman*, 188 N. Y. 478, 480; *People* v. *Muller, supra*). Under this definition "La Ronde" is certainly not "obscene". It has been condemned only on the ground that it is "immoral" and that its presentation "would tend to corrupt morals". The statute sets up no standard defining the term "immoral" and, unlike the word "obscenity" in the criminal statutes, there are no judicial opinions which set forth a workable guide for the censor. As the dissenting opinion in the Appellate Division noted (p. 266) "La Ronde", according to the Regents, "deals with illicit love, usually regarded as immoral. But so is murder. The theme alone does not furnish a valid ground for previous restraint. As to its presentation corrupting the morals of the public, this issue is highly debatable. The record indicates a vast body of informed opinion to the contrary. Under such circumstances the action of the Regents impinges on petitioner's constitutional right of free expression." Since reasonable men may differ on the import and effect of "La Ronde", it follows that there is not a "clear and present danger" sufficiently imminent to override the protection of the United States Constitution (*Thornhill* v. *Alabama, supra*, p. 105).

Under all the circumstances, and this includes the inconsistency between the varying views expressed in the opinions for affirmance herein, we deem the terms "immoral" and "tend to corrupt morals" as used in the statute to be so indefinite as to require reversal here. Indefiniteness

in motion picture censorship statutes was condemned in *Burstyn* (*supra*) and later in *Gelling* v. *Texas* (343 U. S. 960, *supra*). There the United States Supreme Court dealt with an ordinance of the city of Marshall, Texas, which authorized a local board of censors to deny permission to the showing of a motion picture when, in the opinion of the board, it was "of such character as to be prejudicial to the best interests of the people of said City"—inartistic langunge to be sure, but nonetheless having an intent to restrain the showing of motion pictures inimical to the public interest. Two Justices wrote concurring opinions that elucidate the bare *Per Curiam* for reversal, Mr. Justice Frankfurter seeing offense to the Fourteenth Amendment on the score of indefiniteness (citing *Burstyn and Winters*) while Mr. Justice Douglas said (p. 961): "The evil of prior restraint, condemned by *Near* v. *Minnesota*, 283 U. S. 697, in the case of newspapers and by *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, in the case of motion pictures, is present here in flagrant form. If a board of censors can tell the American people what it is in their best interests to see or to read or to hear (cf. *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451), then thought is regimented, authority substituted for liberty, and the great purpose of the First Amendment to keep uncontrolled the freedom of expression defeated."

This thought is not new for indeed thirty years ago a distinguished Governor of this State in his message to the Legislature recommending repeal of an almost identical censorship statute (L. 1921, ch. 715, § 5) had this to say: "Censorship is not in keeping with our ideas of liberty and of freedom of worship or freedom of speech. The people of the State themselves have declared that every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge liberty of speech or of the press. This fundamental principle has equal application to all methods of expression." (Public Papers of Alfred E. Smith [1923], pp. 60, 61.)

As has been said in a great variety of ways, we deem the evil complained of here is far less dangerous to the com-

munity than the danger flowing from the suppression of clear constitutional protection. In our zeal to regulate by requiring licenses in advance we are prone to forget the struggle behind our free institutions. We must keep in mind on all occasions that beneficent aims however laudable and well directed can never serve in lieu of constitutional powers (*Carter* v. *Carter Coal Co.*, 298 U. S. 238) for as was said in *Lovell* v. *Griffin* (303 U. S. 444, 451, *supra*), "The struggle for the freedom of the press was primarily directed against the power of the licensor."

It is no answer to say that the exhibition of motion pictures has a potential for evil which can not be successfully dealt with except by censorship in advance. Such a conclusion overlooks the very significant circumstance that other media of expression are not so censored, for they may not be, but are nonetheless successfully controlled by our penal laws (Penal Law, § 1140-a) which have been resorted to whenever necessary. One of the most recent occasions was the banning of "The Outlaw", a motion picture, by the commissioners of license and the police in New York City, because deemed obscene, indecent and immoral, notwithstanding that the Board of Regents had theretofore issued it a license (*Hughes Tool Co.* v. *Fielding*, 297 N. Y. 1024, affg. 272 App. Div. 1048). Reported instances of resort to criminal sanctions as a method of control are relatively infrequent but this is not at all surprising as the industry itself has its own Production Code in which it recognizes its responsibility to the public to provide approved entertainment in connection with which the potential power of the public boycott is not overlooked, exerting as it does, a direct influence in the box office, on the profitable operation of which the producers must depend (cf. Motion Pictures and the First Amendment, 60 Yale L. J. 696).

In conclusion then, it must be said that the New York censorship statute as applied in advance to the exhibition of motion pictures infringes constitutional freedom of speech and press, that the within case is not so exceptional as to require banning under a valid exercise of the police power and that the statute is invalid in any event for lack of definitive administrative criteria.

The order appealed from should be reversed and the matter remitted to the Board of Regents with direction to issue a license.

FULD, J. (dissenting). I agree with Judge DYE and, for myself, would add these words only to underscore what he has written.

That the freedom of expression assured by the First Amendment is not limited to "the air-borne voice, the pen, and the printing press" (Chafee, Free Speech in the United States [1941], p. 545), but extends as well to motion pictures, is now beyond dispute. (See *Gelling* v. *Texas*, 343 U. S. 960; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495.) While I conceive that any legislation imposing a previous restraint on the exhibition of moving pictures is condemned by the Constitution, I do not believe it necessary to invoke that broad principle to reach a decision in this case. Here again, as in *Burstyn*, the censorship statute must fall because of the lack of a sufficiently definite standard or guide for administrative action.

The Education Law provision under review authorizes the Regents to prohibit, in advance, the exhibition of any picture which they deem "immoral" or which they conclude may "tend to corrupt morals". Terms of such vague and undefined limits, however, fail to furnish the objective criterion necessary to insure that there shall be no interference with the exercise of rights secured by the First Amendment. By attempting to cover so much, the catch-all provision barring motion pictures which the censors believe "immoral" effectively covers nothing. The ephemeral and ambiguous character of the term is highlighted by the variant views of the very judges who now write to uphold the statute. Words as subjective as those under consideration find meaning only in the mind of the viewer and observer, render impossible administration of the statute and offend against due process. "Prohibition through words that fail to convey what is permitted and what is prohibited for want of appropriate objective standards, offends Due Process in two ways. First, it does not sufficiently apprise those bent on obedience of law of what may

reasonably be foreseen to be found illicit by the law-enforcing authority, whether court or jury or administrative agency. Secondly, where licensing is rested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative." (*Joseph Burstyn, Inc.* v. *Wilson, supra*, 343 U. S., at p. 532, per FRANKFURTER, J., concurring; see also, *Gelling* v. *Texas, supra*, 343 U. S. 960; *Musser* v. *Utah*, 333 U. S. 95.)

I would reverse and annul the determination of the Board of Regents.

LEWIS, J., concurs with FROESSEL, J.; DESMOND, J., votes for affirmance in a separate opinion; CONWAY, J., in a memorandum, concurs in the opinions of FROESSEL and DESMOND, JJ.; DYE, J., dissents in an opinion in which FULD, J., concurs and votes for reversal in a separate opinion; LOUGHRAN, Ch. J., deceased.

Order affirmed.

APPENDIX "B"

OPINIONS RENDERED BY THE APPELLATE DIVISION OF THE SUPREME COURT, THIRD JUDICIAL DEPARTMENT

(June 13, 1952)

In the Matter of COMMERCIAL PICTURES CORPORATION, *Petitioner, against* BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, *Respondent*

BERGAN, *J.*:

The Board of Regents having affirmed a determination of the Motion Picture Division of the State Education Department refusing to license exhibition of the French film "La Ronde", the petitioner brings here a proceeding to review in pursuance of Article 78 of the Civil Practice Act.

New York's statutory policy in licensing motion picture films for public exhibition is expressed in Section 122 of the Education Law, which provides that licenses shall be granted unless, among other things, the film is "immoral"

or is of such character that its "exhibition would tend to corrupt morals".

The Supreme Court has very recently held that New York was without power to withhold a license by virtue of this section of the Education Law on the ground a film was deemed by the Regents to be sacrilegious (*Joseph Burstyn, Inc.* v. *Wilson*, — U. S. —, 72 S. Ct. 777). We have no doubt, however, both from the area that was expressly left open in that case by the Supreme Court and from the generally accepted power of a State to deal by its municipal law with matters deemed offensive to public morals that the statute delegating the power of licensing to the Regents remains valid to that extent in a proper case.

On its review of the Education Department's determination adverse to "La Ronde", the Regents referred the question of evaluating the film to a committee of its own members who reported the opinion that the film presents a chain of sequences "each dealing with * * * amorous adventures" of which "Promiscuity is the central theme". The committee felt that "Prostitution and sex indulgence is the end result".

The view expressed by the committee was that the presentation of the film in New York would be "immoral" and "would tend to corrupt morals". The Regents adopted this report and affirmed the refusal of the department to issue the license.

The film has been exhibited to us. Upon the basis of our evaluation of it; upon what American and English critics think of it as a work of art; upon its reception among artists and journalists; and upon the public permission for exhibition granted in many large and diverse communities, we are asked to annul what the Regents have determined and direct a license be issued in New York.

It is argued that the film ran nearly two years in Paris, over a year in London which has quite rigid standards in this respect, and was voted the best film from any source by the British Academy. It was exhibited for relatively long periods in Los Angeles, San Francisco, Washington, St. Louis and Detroit. There have been high evaluations of it by reputable critics.

It could, however, be argued and believed by fair-minded men that this film is immoral and perhaps also that it would "tend to corrupt" public morals. If we say this we come to the end of our inquiry, even though we admit that other fair-minded men could argue and believe that the film is not immoral from any mature aspect and that it would leave public morality profoundly uncorrupted.

Even if we had very strong and favorable impressions of the artistic acceptability and dramatic integrity of the film, and a majority of the court have some reservations, to say the least, about that, we would feel an absence of judicial power to impose those views on the Regents and to require by judicial mandate a license for the public exhibition of the film.

It is pleaded by the petitioner here that the Regents have been "unreasonable", "discriminatory" and "arbitrary" in refusing to direct a license be issued, and thus the case brings up the wide and ranging difficulties and the delicate adjustments that inhere in a process by which reviewing judges look into and sometimes undo the work of administrative officers.

Satisfactory definitive terms to give sure footing to the tread of future cases have never been formulated. No one has been able clearly to mark out in advance the exact point where a judge will interfere, and separate it from the area in which he will not interfere, with what the administrator has done.

Loose adjectives like "unreasonable" and "arbitrary" and "capricious" and "unwarranted" have been used to describe the kind of administrative decision which brings about judicial interference, but, of course, the shortcoming of these words is that they mean quite different things to parties on the opposite side of a case.

What is not so clearly understood about the process of reviewing the work of administrators is that resort must be had to standards which the legal profession has learned as part of its disciplined study and its pragmatic experience and which can be formulated if at all only in the terms of a tradition.

Thus, when a judge hands down a ruling that an administrator has been "unreasonable" or "arbitrary", he does so because, of course, in the first place he disagrees with what the administrator has done; but that is not all there is to it. He uses "unreasonable" and "arbitrary" not quite in the word sense in which they are to be found in general dictionaries but he uses them and a whole other group of words freighted with a meaning that generations of lawyers have added to them as part of the material which the profession used to give voice and expression to law.

If more scientific definition were contrived the task of the lawyer in advising his client what to do would be infinitely easier and prediction of judicial action would be something more of an exact science. But a forecast based on an informed professional synthesis is itself a science and not only requires the dedication of intelligent experience and objective thinking to the task, but its practice is the most significant way in which the lawyer serves the community. A man does not need legal advice to know he violates a traffic law when he passes a red light but there are wide areas of law where his protection and safety lie in the judgment of the profession addressed to future judicial action.

Nowhere is the hardness of the ground of definition in the field of judicial review better illustrated than in the opinion of Mr. Justice FRANKFURTER in *Universal Camera Corp.* v. *Labor Bd.* (340 U. S. 474 [1951]), a decision now frequently pressed on the attention of this and other courts which review administrative determinations and cited on this appeal to authorize a revocation of the Regents' determination.

There the court had before it the question whether the power and duty of inquiry on judicial review of determinations of the National Labor Relations Board had been widened by congressional use of the term "supported by substantial evidence on the record considered as a whole" instead of the previous words "supported by evidence" (p. 477).

The problem presented revolved around the scope of inquiry under a specific Federal statute, but the definitive

difficulties met by the court are characteristic of the trouble with terminology in judicial review generally. Several distinct attempts were made by the court at redefinition (pp. 488, 489). For instance, the requirement "for canvassing 'the whole record'" does not "furnish a calculus of value" by which the reviewing court can "assess the evidence" (p. 488).

But at the end of this and a series of other undertakings in the opinion toward definition, it was admitted that new expressions are unlikely to be better than old ones and that the way the courts interfere with administrative findings "cannot be imprisoned within any form of words" (p. 489).

These failing steps toward definition lead back and around again to a resort to legal tradition; to the judge speaking from, and affected by, the disciplined standards of his own profession. The trained lawyer can weigh and predict judicial action based on those standards which both he and the judge sense together, whatever the weaknesses may be in formulation.

There exists on the judicial side of the work a certain detachment from the heat of the quarrel, an objectivity that neither contestant is expected to feel but which both sides expect the judge to have. This allows the judge to see patiently the administrative action complained of in the light of historic and of future power and the effect of that power on the community and the laws of the community; and it implies that the judge has the insight to see that even if he would do the administrator's work differently he would not necessarily undo it in the case at hand.

The process of judicial review involves the judge projecting himself into the place of the administrator and learning that there are admissible viewpoints in the administrator's work which may be quite different from some that the judge think of as important; and admissible policies and decisions to which the judge, had he full freedom of action, might not subscribe but which he deems necessary to sustain on review. The process is not unlike the one by which juries attempt to see the intentions of contracting parties and the anticipations of those involved in torts.

It is our judgment based on the professional view that has been taken rather consistently in cases of this kind that a ground sufficient to warrant interference with the Regents' judgment that "La Ronde" is immoral has not been shown.

The determination of the Regents should be confirmed, with $50 costs and disbursements.

FOSTER, *P. J.* (dissenting):

We have before us for review a determination of the Board of Regents which refused to license the exhibition of a motion picture known as "La Ronde". The statutory scheme for the censorship of motion pictures is contained in Section 122 of the Education Law. Recently (May 26, 1952) the Supreme Court of the United States (— U. S. —) held that a motion picture (The Miracle) could not be barred under the statute cited on the ground that it was sacrilegious. The decision went further however. It held that expression by means of motion pictures is included within the free speech and free press guaranty of the 1st and 14th Amendments to the Constitution of the United tates. To that extent it overruled or repudiated a previous decision (1915) in *Mutual Film Corp.* v. *Ohio Industrial Comm.* (236 U. S. 230), which held in effect that motion pictures were not to be regarded as organs of public opinion but merely as entertainment spectacles.

We now have a different rule to follow, and the question naturally arises whether the statute involved, providing, as it does, for a previous restraint in the licensing of motion pictures, is constitutional. The Supreme Court decision in *The Miracle* case left open the question of whether a State may censor motion pictures under a clearly-drawn statute designed and applied to prevent the showing of obscene films.

Since films are now entitled to protection of the 1st and 14th Amendments a previous restraint thereon is, by all analogy, an infringement upon freedom of expression and repugnant to constitutional guarantees (*Near* v. *Minnesota*; 283 U. S. 697). Freedom of expression is the rule, not the exception. It is difficult to see how a statute can be drawn, providing for previous restraint, that would be consistent

with such views. Either motion pictures may be censored or they cannot be. I can see no practical middle ground. That is not to say, of course, that punishment may not follow after the event if a law against obscenity or immorality has been violated. This is the traditional constitutional view as to speech and press. The individual is free to say or write what he thinks, but he must accept the responsibility therefor and may be punished if he offends the law.

Since freedom of expression is the rule and any limitation thereof may only be exercised in exceptional cases the statute under which the Regents acted can hardly be envisaged as the "clearly drawn statute" which the Supreme Court mentions. Except for news, educational and scientific films it confers a broad power of censorship. The deep inconsistency between this power and the constitutional guarantee of freedom of expression is well illustrated in this State by the limited power of review which the courts may exercise over the acts of an administrative body such as the Regents. It there is substantial evidence to sustain the determination of such a body, or even a reasonable basis to sustain it, the courts may not interfere and substitute their judgment. Thus, if the issue is debatable, the action of the administrative body is uniformly upheld. As applied to censorship, and apply it we must if the statute in question is a valid one, such a rule would seem fallacious. In dealing with an issue of free expression the rule should be quite to the contrary, and the determination of any board or bureau should only be upheld where it is clear that any conclusion to the contrary would not be entertained by any reasonable mind. It is wholly inconsistent with a constitutional guarantee to leave any debatable issue of morals, involved in any form of protected expression, to the final decision of an administrative agency. Since a constitutional issue is involved litigants should be entitled to the independent judgment of a competent court after the event.

In the present case the film in question is certainly not obscene. It has been condemned on the ground that it is "immoral" and its presentation "would tend to corrupt morals". True it deals with illicit love, usually regarded as immoral. But so is murder. The theme alone does not

furnish a valid ground for previous restraint. As to its presentation corrupting the morals of the public, this issue is highly debatable. The record indicates a vast body of informed opinion to the contrary. Under such circumstances the action of the Regents impinges on petitioner's constitutional right of free expression.

I am constrained to hold that the statute providing for censorship is unconstitutional, but in any event that the film in question is not so immoral as to justify censorship.

The determination should be annulled.

HEFFERNAN and COON, JJ., concur with BERGAN, J.; FOSTER, P. J., dissents in an opinion in which BREWSTER, J., concurs.

Determination confirmed, with $50 costs and disbursements.

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